

SERVED : November 10, 1992

NTSB Order No. EA-3713

**UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.**

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 24th day of October, 1992

THOMAS C. RICHARDS,
Administrator, '
Federal Aviation Administration,

Complainant,

Docket SE-10606

v.

SHELDON LEE RUDZEK,

Respondent.

OPINION AND ORDER

Respondent appeals from the oral initial decision of Administrative Law Judge John E. Faulk issued in this proceeding on August 15, 1990 at the conclusion of an evidentiary hearing.¹ The law judge affirmed an order of the Administrator issued on October 24, 1989, suspending respondent's airman certificate for 120 days for violations of sections 91.105(a), 135.207, and 91.9

¹A copy of the oral initial decision, an excerpt from the transcript, is attached.

of the Federal Aviation Regulations (FAR), 14 C.F.R. Parts 91 and 135.²

On December 22, 1988, respondent acted as pilot in command of a Bell Model 206L-1 helicopter flying under visual flight rules (VFR) from Marion, Illinois to Cape Girardeau, Missouri as a helicopter emergency medical service operation covered under 14 C.F.R. Part 135. This flight was the return trip after picking up a seriously injured patient in Marion, Illinois. Fog and the loss of any visual surface light reference led to the crash landing of the helicopter. A flight nurse, a respiratory technician, and the patient were all fatally injured in the crash. The helicopter was destroyed.

Respondent does not deny that he operated the helicopter outside the mandates of FAR sections 91.105(a) and 135.207. He asserts that this operation was excused by FAR sections 91.3 and

²FAR sections 91.105(a), 135.20.7, and 91.9 as were in effect at the time of the incident state, in relevant part:

"§ 91.105 *Basic VFR weather minimums.*

(a) Except as provided in § 91.107, no person may operate an aircraft under VFR when the flight visibility is less, or at a distance from clouds that is less, than that prescribed for the corresponding altitude in the following table: [showing that within controlled airspace the flight visibility must be three statute miles].

"§ 135.207 *VFR: Helicopter surface reference requirements.*

No person may operate a helicopter under VFR unless that person has visual surface reference or, at night, visual surface light reference, sufficient to safely control the helicopter."

"§ 91.9 *Careless or reckless operation.*

Aircraft operations for the purpose of air navigation. No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

135.19,³ permitting operation outside of the regulations in emergency situations. Therefore, he further asserts that he did not act carelessly or recklessly under FAR section 91.9.

Respondent does not claim that the emergency was related to the patient he was carrying. He claims that a sudden change in the weather caused the situation which made it necessary for him to operate outside the regulations.

The testimony from the witnesses and the exhibits put on by the respondent showed that when respondent originally departed St. Francis, the Cape Girardeau hospital facility, the weather was remarkably clear, but that during the return trip an advection fog, which was very heavy and unforecast, appeared quite suddenly. However, considering the fact that this flight was a Part 135 passenger carrying flight, the law judge correctly found that the respondent did not meet his duty of due care. The law judge suggested that this duty might have been met by acquiring adequate and correct weather reports from the best

³FAR sections 91.3(b) and 135.19 read, in pertinent part:

"§ 91.3 *Responsibility and authority of the pilot in command.*

(b) In an emergency requiring immediate action, the pilot in command may deviate from any rule of this subpart or of Subpart B to the extent required to meet that emergency."

"§ 135.19 *Emergency operations.*

(b) In an emergency involving the safety of persons or property, the pilot in command may deviate from the rules of this part to the extent required to meet that emergency."

sources available⁴ and by calling the designated air traffic control center before proceeding under IFR conditions into a control zone. Because the respondent has not adequately shown that he took every step to prevent or avoid an emergency, the emergency is of his own makings. Therefore, the Board affirms the law judge's finding that the respondent's emergency defense does not apply.

⁴Respondent obtained the terminal forecast for the Cape Girardeau area from the National Weather Service at 7:00 p.m. on December 21, 1988. Respondent took off from Cape Girardeau at 3:00 a.m. on December 22, 1988. The crash occurred at approximately 4:30 a.m. on December 22, 1988. Respondent's only verification of the forecast was through observation.

⁵"It is well settled that the exculpatory effect of Section 91.3(b) is applicable only when the IFR weather conditions in which a pilot finds himself were unforeseeable and not avoidable by the exercise of sound judgment before and during the flight." (footnotes omitted) *Administrator v. Austin*, 2 NTSB 662, 663 (1974) .

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The initial decision and the order of suspension are affirmed; and
3. The 120-day suspension of respondent's airman certificate shall begin 30 days from the date of service of this order.⁶

VOGT , Chairman, COUGHLIN, Vice Chairman, LAUBER, HART, and HAMMERSCHMIDT , Members of the Board, concurred in the above opinion and order.

⁶For the purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).